No. 92-949

In The

Supreme Court of the United States

October Term, 1992

EL VOCERO DE PUERTO RICO
(CARIBBEAN INTERNATIONAL NEWS CORP.)
JOSE A. PURCELL,

Petitioners,

versus

THE COMMONWEALTH OF PUERTO RICO;
HON. MILAGROS RIVERA GUADARRAMA;
HON. LUIS SAAVEDRA SERRANO;
HON. CARLOS RIVERA MARTINEZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Puerto Rico

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

TO THE HONORABLE COURT:

Petitioners El Vocero de Puerto Rico (Caribbean International News Corp.) and José A. Purcell, through their counsel of record, respectfully submit the present Supplemental Brief to bring to the attention of this Court new matter pertaining to parallel federal litigation, pursuant to Rule 15.7 of this Court.

I. Introduction

The undersigned was served copy of a December 29, 1992 letter addressed to the Clerk of this Court, Hon. William K. Suter, which must be understood as an express waiver of the right to file an opposition brief.[1]

At pages 4-6 of our petition we called attention to ongoing parallel federal litigation. In *Rivera Puig v. García Rosario*, 785 F.Supp. 278 (D-P.R. 1992), the district court held that the First Amendment presumption of access recognized in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*) applies to preliminary hearings held in Puerto Rico, and P.R. Cr. Rule 23(c) was declared unconstitutional for establishing a presumption of closure.

The U.S. Court of Appeals for the First Circuit squarely affirmed the lower court's ruling by a judgment and opinion issued on December 18, 1992 (Torruella, J.).

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[1] The letter concludes: "the Solicitor General will not be filing a brief in opposition to the petition unless ordered to do so by the Court."

See, ___ F.2d ___ 1992 WL380014 (1st Cir. P.R.); 1992 U.S. App. LEXIS 33424.

The judgment issued by the P.R. Supreme Court, holding that *Press-Enterprise II* is inapplicable and that mandatory closure is justified, is in conflict with *Rivera Puig*. The conflict is profound and inescapable, and therefore constitutes "a special and important reason" for granting our petition for a writ of certiorari, according to Rule 10.1(b) of the Rules of this court.

We will concisely summarize the most salient points of the First Circuit opinion, with special attention to its dispositive aspects.

II. The First Circuit decision in Rivera Puig

In both the federal and commonwealth litigations, a request for access to preliminary hearings was denied outright, on the strength of Rule 23(c)'s mandatory language to the effect that the hearing shall be held in private. There are no factual controversies in either forum, which helps to accentuate the identity of the issues involved. The Solicitor General is counsel of record for all defendants in both forums, while the undersigned at all times has been counsel for plaintiffs.[2]

Judge Torruella concludes that " . . . Rivera-Puig had a clear First Amendment right which is being flagrantly

[2] The letter of December 29, 1992 keeps consciously silent as to the First Circuit judgment. It brings to mind the way that the court below chose not to acknowledge, even **en passant**, the judgment of the district court which preceded its own by more than five months.

violated by the commonwealth authorities." (Slip op. at 20). The issue "has been long pending in the commonwealth courts,[3] and Rivera-Puig and the public have been suffering irreparable constitutional harm by *appellants' refusal to comply with the law of the land.*" (Id. at 25; emphasis added).

Press-Enterprise II's First Amendment presumption of openness applies to Rule 23(c) proceedings because "the Puerto Rico preliminary hearings essentially duplicate the California and federal preliminary hearings." (Slip op. at 27). Reference is made to the district court's factual conclusions in that regard, reported at 785 F.Supp at 289, which were unchallenged and are "uncontrovertible." Id.[4]

At pages 28-30, the First Circuit sets forth sixteen (16) separate and specific functional similarities between the Puerto Rico and California proceedings,[5] concluding:

> There is no substantial difference between the Puerto Rico and California preliminary hearings with respect to basic scope or purpose, importance of the proceeding within the judicial setting, or legal context within the criminal process. Distinguishing these two proceedings is

[3] The federal action was filed on January 17, 1992. Consideration of the same issue by the commonwealth supreme court had begun on March 2, 1990 and extended for a total of some 28 months. The district court granted declaratory relief in 14 days.

[4] See our petition for certiorari, pp. 4-5, notes 2 and 4.

[5] Compare with those similarities set forth at pages 9-16 of our petition for certiorari. It will be noted that case law and statutes cited are substantially the same.

an attempt to distinguish the "indistinguishable." (Id., p. 30).

The court remanded the case to the district court to take such actions as are necessary to "achieve compliance with this judgment 'with all deliberate speed' ",[6] pointedly clarifying that if "required by the circumstances, the district shall issue injunctive relief." (Slip op. at 31). This provision refers to the two previous denials of injunctive relief by the district court, "expressing pious hope that the 'Puerto Rico judiciary, a traditionally responsible institution', would comply with the decision without the need for 'the strong medicine of injunction.' " Id., at 10.[7]

Conflicts between state supreme courts and federal appeals courts have always received due weight by this Court in deciding whether to grant a writ of certiorari. In the present case we have a classic situation in which the First Circuit and the Commonwealth Supreme Court have addressed the same issue with entirely different results.

III. In Conclusion

The First Circuit has issued a judgment that is radically incompatible with the judgment of the Supreme Court of Puerto Rico. We respectfully submit that the

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[6] Citing *Brown v. Board of Education*, 349 U.S. 294 (1955). See also I Rotunda and Nowak, "Treatise on Constitutional Law, Substance and Procedure" §1.6 notes 24-25 and accompanying text (2nd Ed. 1992).

[7] See also note 7 of the opinion. The declaratory judgment was rendered nugatory by public statements of Chief Justice Andreu in early February. He later voted with the 4-3 majority.

conflict is a "special and important" reason to grant the petition for certiorari. Rule 10.1(b) of the Rules of this Court.

Respectfully Submitted this 11th day of January, 1993.

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